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No. 01-1772

In the Supreme Court of the United States

KEN ROBERTS COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Trade Commission was authorized to issue administrative subpoenas to investigate petitioners' marketing of instructional materials that purport to advise consumers how to make money through commodities and securities trading.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Board of Trade v. *SEC*, 677 F.2d 1137 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982)	10
CAB v. *Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951 (D.C. Cir. 1979)	4, 7
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976)	11
Chicago Mercantile Exch. v. *SEC*, 883 F.2d 537 (7th Cir. 1989), cert. denied, 496 U.S. 936 (1990)	10
Clayton Brokerage Co. v. *Mouer*, 531 S.W.2d 805 (Tex. 1975)	10
Edmond v. *United States*, 520 U.S. 651 (1997)	14
Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501 (1943)	4, 7
FTC v. *Cement Inst.*, 333 U.S. 683 (1948)	13
FTC v. *Miller*, 549 F.2d 452 (7th Cir. 1977)	7
Gordon v. *New York Stock Exch., Inc.*, 422 U.S. 659 (1975)	12
International Trading, Ltd. v. *Bell*, 556 S.W.2d 420 (Ark. 1977), cert. denied, 436 U.S. 956 (1978)	10
Minnesota v. *Coin Wholesalers, Inc.*, 250 N.W.2d 583 (Minn. 1976)	10
Morton v. *Mancari*, 417 U.S. 535 (1974)	6, 11
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	10
Posadas v. *National City Bank*, 296 U.S. 497 (1936)	13

Cases—Continued: Page

Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 (1976) 6, 11, 13
SEC v. *American Commodity Exch., Inc.*, 546 F.2d 1361 (10th Cir. 1976) 10
Tennessee Valley Auth. v. *Hill*, 437 U.S. 153 (1978) 11
United States v. *Cabrini Med. Ctr.*, 639 F.2d 908 (2d Cir. 1981) 7
United States v. *Radio Corp. of America*, 358 U.S. 334 (1959) 13
United States v. *Tynen*, 78 U.S. (11 Wall.) 88 (1870) 13
United States v. *United Cont'l Tuna Corp.*, 425 U.S. 164 (1976) 6
United States v. *W.T. Grant Co.*, 345 U.S. 629 (1953) 13

Statutes:

Commodity Exchange Act, 7 U.S.C. 1 *et seq.*:
7 U.S.C. 2(a)(1)(A) 5, 8, 9, 13
7 U.S.C. 6*o*(1)(A) 11
7 U.S.C. 6*o*(1)(B) 11
7 U.S.C. 6*l*(3) 9
7 U.S.C. 7 8
7 U.S.C. 23 8
Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*:
15 U.S.C. 45 (§ 5) 2
15 U.S.C. 45(a) 5
15 U.S.C. 45(a)(1) 12
15 U.S.C. 52 (§ 12) 2, 5
15 U.S.C. 53 5
15 U.S.C. 54 5
15 U.S.C. 57b-1(c) 5
Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.* 4
15 U.S.C. 80b-6(4) 12

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 276 F.3d 583. The decision of the district court (Pet. App. 25a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 2001. A petition for rehearing was denied on March 1, 2002 (Pet. App. 27a-28a). The petition for a writ of certiorari was filed on May 30, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Ken Roberts Co. and United States Chart Co. advertise and sell books, videos, and

cassettes that purport to advise consumers how to get rich buying and selling commodity futures. Petitioners Ken Roberts Institute, Inc., and the Ted Warren Corp. sell similar materials that advise consumers about securities trading. The internet websites through which petitioners market their materials include such claims as:

> The only thing you need to become wealthy in the Stock Market is a price chart . . . It's the same tool you can use to make your own personal fortune. To see $1,000 turn into $2,000. Then $2,000 into $5,000. And $5,000 into $10,000.
>
> Ken Roberts consistently makes profits of 200% . . . 400% . . . even 1000% and up. . . .
>
> Since my technique was rated #1 in America two years in a row—*the least amount of real money into the most*—by an independent consumer rating service, obviously it's something very different from what most others do.

C.A. App. A10.

On September 7, 1999, the Federal Trade Commission (FTC) approved a Resolution Directing Use of Compulsory Process in Non-Public Investigation of Internet Advertisers, Sellers, and Promoters. C.A. App. A13. The resolution authorized the use of compulsory process to determine whether internet advertisers, sellers, and promoters may be violating Sections 5 or 12 of the FTC Act, 15 U.S.C. 45, 52, by deceptively marketing goods or services on the internet. The investigation is also intended to determine whether FTC action to obtain consumer redress would be in the public interest. C.A. App. A13.

On September 30, 1999, the FTC issued two Civil Investigative Demands (CIDs) as part of its investigation into petitioners' marketing practices. C.A. App. A14-A32. Those administrative subpoenas sought, among other things, copies of petitioners' advertising, any substantiation for the claims made in the advertising, and information regarding any individual who had given a testimonial used in the advertising. See *ibid.* Petitioners failed to provide a complete response to the CIDs. See *id.* at A11. Instead, they filed with the FTC an administrative petition to quash both CIDs. *Id.* at A33-A71. They argued that the FTC had no jurisdiction for its investigation because the Ken Roberts Co. and the United States Chart Co. are commodity trading advisers, subject to the exclusive jurisdiction of the Commodity Futures Trading Commission (CFTC), and the Ken Roberts Institute and the Ted Warren Co. are unregistered investment advisers, subject to the exclusive jurisdiction of the Securities and Exchange Commission (SEC). See *id.* at A35.

The FTC denied the petition to quash. C.A. App. A72-A81. The FTC concluded that, under the Commodity Exchange Act (CEA), the CFTC's area of exclusive jurisdiction extends only to the regulation of the futures market itself. Accordingly, the CEA does not preclude enforcement of laws of general application, such as the FTC Act, with respect to petitioners' marketing of instructional materials. *Id.* at A75-A77. The FTC also rejected petitioners' argument that the CEA impliedly repeals or preempts the FTC's authority to investigate petitioners' marketing of instructional materials. *Id.* at A77-A80. Finally, the FTC held that, even if petitioners Ken Roberts Institute and Ted Warren Co. are "investment advisers," subject to the jurisdiction of the SEC, that jurisdiction is not exclu-

sive. *Id.* at A80-A81. The FTC ordered petitioners to comply in full with the CIDs. *Id.* at A81. Petitioners refused. *Id.* at A12.

2. The FTC then petitioned the United States District Court for the District of Columbia to enforce the two CIDs. C.A. App. A4-A8. In opposition, petitioners again argued that the CEA expressly or impliedly repeals the FTC's authority to investigate those aspects of petitioners' business that involve the marketing of materials related to profiting through transactions in commodity futures, and that the Investment Advisers Act of 1940 (IAA), 15 U.S.C. 80b-1 *et seq.*, precludes the FTC from investigating the marketing of materials that relate to stock trading. C.A. App. A144-A184.

After a hearing, the district court concluded that it was "satisfied that the [FTC's] inquiry is within the authority and jurisdiction of the agency, that the requests made by the CIDs issued to [petitioners] are reasonably relevant to the FTC inquiry * * *, and that responding to the interrogatories and producing the documents is not unduly burdensome." C.A. App. A279. The court therefore ordered petitioners to comply in full with the CIDs. Pet. App. 25a-26a.

3. The court of appeals affirmed. Pet. App. 1a-24a. Citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943), and the decisions of courts of appeals, the court observed that courts must give administrative agencies wide latitude in asserting their power to investigate by subpoena. Pet. App. 6a-9a. Therefore, the court noted, "enforcement of an agency's investigatory subpoena will be denied only when there is 'a patent lack of jurisdiction' in an agency to regulate or to investigate." *Id.* at 9a (quoting *CAB* v. *Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952 (D.C. Cir. 1979)).

Based on a detailed analysis of the relevant statutory provisions, the court held that there is no "patent lack of jurisdiction" in this case. *Ibid.*

The court first reviewed the FTC Act and concluded that there is ample authority in the Act for the FTC's investigation. Pet. App. 9a-10a (citing 15 U.S.C. 45(a), 52-54, 57b-1(c)). Therefore, the court concluded, "the FTC is entitled to have its subpoenas enforced unless some other source of law patently undermines these broad powers." *Id.* at 10a.

The court next addressed petitioners' contention that the CEA preempts the FTC's authority over the Ken Roberts Co. and the United States Chart Co. because the CEA gives the CFTC exclusive jurisdiction over the activities of those companies. Pet. App. 10a-20a. The court recognized that the CEA, 7 U.S.C. 2(a)(1)(A), gives the CFTC exclusive jurisdiction over the regulation of commodities and commodities trading markets. Pet. App. 12a-18a. The court concluded, however, that the CEA contemplates "a regime in which other agencies may share power with the CFTC over activities that lie outside the scope of § 2(a)(1)(A)" but within other jurisdictional authority of the CFTC. *Id.* at 18a. The court determined that the marketing of investor-education courses by commodities trading advisors falls within that area of overlapping jurisdiction. *Id.* at 18a-20a. Therefore, the court held that "there is no 'patent lack of jurisdiction' in the FTC to investigate" petitioners Ken Roberts Co. and United States Chart Co. *Id.* at 20a.

The court then addressed the argument of petitioners Ken Roberts Institute and Ted Warren Corp. that the IAA repeals by implication the FTC's jurisdiction "to regulate the fraudulent practices of 'investment advisors.'" Pet. App. 20a. The court first reviewed this

Court's precedent that establishes that repeals by implication are "not favored," *id.* at 21a (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting in turn *United States* v. *United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976))). The court recognized that "the IAA and the FTC Act employ different verbal formulae to describe their antifraud standards," but the court concluded that the two standards do not impose "conflicting or incompatible obligations." Pet. App. 22a. Because the FTC Act and the IAA are "capable of co-existence," the court held that it is "the *duty* of this court 'to regard each as effective'" absent clear congressional intent to the contrary. *Id.* at 22a-23a (quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)). The court noted that petitioners "point to nothing in the background or history of the IAA that demonstrates (or even hints at) a congressional intent to preempt the antifraud jurisdiction of the FTC over those covered by the" IAA. *Id.* at 23a. The court therefore held that petitioners had not presented any argument "sufficiently forceful to deprive the Commission of its general prerogative to determine, at least in the first instance, the scope of its own investigatory authority." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, this Court's review is not warranted.

1. Petitioners incorrectly contend (Pet. 23) that the court of appeals evaded their challenge to the FTC's jurisdiction. Rather, the court determined that the FTC had sufficient authority to obtain compliance with the two CIDs because petitioners had not demon-

strated a "patent lack of jurisdiction" in the FTC to conduct its investigation. Pet. App. 9a (citing *CAB* v. *Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952 (D.C. Cir. 1979)). The court thus addressed the only jurisdictional issue that was properly before it. See *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) (judicial review is limited to determining whether agency subpoena is "plainly incompetent or irrelevant to any lawful purpose"). Should the FTC's investigation of petitioners result in a complaint challenging any aspect of their conduct, petitioners remain free to raise a jurisdictional challenge to the complaint, or to any order that might ensue.

Contrary to petitioners' contentions (Pet. 24-25), neither *United States* v. *Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981), nor *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977), conflicts with the court's holding here that the FTC had authority to issue the CIDs because there was no "patent lack of jurisdiction." In both of those cases, the courts concluded that the relevant statutes clearly and specifically precluded the investigations at issue. See *Cabrini Med. Ctr.*, 639 F.2d at 910 (concluding that "there is and can be no authority for" investigating the medical center based on its receipt of Medicare and Medicaid because the statute "make[s] it clear that the federal agencies are to concern themselves with investigation and enforcement only where the 'primary objective of the Federal financial assistance is to provide employment'"); *Miller*, 549 F.2d at 456-457, 460 (stating that "the words of the Act plainly exempt from the agency's investigatory jurisdiction any corporation holding the status of a common carrier regulated by the ICC" and concluding that the subpoenaed common carrier "has a clear right, conferred upon it by statute, to be free from FTC investigation").

Neither the CEA nor the IAA, nor the FTC Act itself, contains any provision limiting the FTC's authority to conduct the investigation at issue here.

2. Petitioners also err in contending (Pet. 4-13) that this Court's review is warranted to determine whether the FTC's jurisdiction to regulate their marketing practices is displaced by the exclusive jurisdiction provision of the CEA, 7 U.S.C. 2(a)(1)(A). As an initial matter, that question is not squarely presented by this case. As discussed above, because this case is a subpoena enforcement proceeding, the court of appeals did not definitively resolve that question but held only that petitioners' preemption claim was "not compelling enough" to establish a "'patent lack of jurisdiction' in the FTC to investigate or regulate in this case." Pet. App. 20a.

In any event, the court of appeals' tentative conclusion that petitioners' marketing activities do not fall within the CEA's exclusive jurisdiction provision was correct. That provision states that:

> The [CFTC] shall have exclusive jurisdiction * * * with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated * * * pursuant to [7 U.S.C. 7] or any other board of trade, exchange, or market, and transactions subject to regulation by the [CFTC] pursuant to [7 U.S.C. 23].

7 U.S.C. 2(a)(1)(A). Petitioners argue (Pet. 10-13) that their sales of instructional materials constitute "trans-

actions involving contracts of sale of a commodity." But, as the court of appeals noted, "it strains common parlance to construe 'transactions involving contracts of sale of a commodity' to include the marketing practices of a firm that does not buy and sell futures, but rather merely instructs others how to do so." Pet. App. 14a.

Nor are petitioners assisted by the provision of the CEA relating to commodity trading advisors, 7 U.S.C. 6*l*(3), which uses the word "transactions" twice in the same sentence to mean two different things. See Pet. 7-8. As the court of appeals explained (Pet. App. 15a), the second reference to "transactions" in Section 6*l*(3) clearly does not encompass petitioners' marketing activities. Thus, the court of appeals correctly interpreted the term "transactions" as used in 7 U.S.C. 2(a)(1)(A) to include "a set of arrangements directly related to the actual sale of commodities futures" and to exclude the marketing of materials purporting to provide investment advice. Pet. App. 16a.[1]

The court of appeals' decision does not conflict with any of the cases cited by petitioners (Pet. 10-11), because none of those cases involves either a challenge to the enforcement of an administrative subpoena or the marketing and sale of instructional materials. Instead, all those cases concern regulation of the actual sale of options or futures contracts or securities. See

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[1] Petitioners incorrectly contend (Pet. 6-9) that the court of appeals disregarded Congress's finding that advice on investing in commodities and futures contracts "affect[s] substantially transactions on contract markets." 7 U.S.C. 6*l*(3). Contrary to that contention, there is no inconsistency between Congress's finding that sales of investment materials "*affect substantially* transactions on contract markets" (emphasis added) and the court of appeals' conclusion that sales of investment materials do not *constitute* "transactions involving" commodity futures contracts.

Chicago Mercantile Exch. v. *SEC*, 883 F.2d 537 (7th Cir. 1989), cert. denied, 496 U.S. 936 (1990) (trading of futures contracts); *Board of Trade* v. *SEC*, 677 F.2d 1137 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982) (trading in options on mortgage-backed certificates); *SEC* v. *American Commodity Exch., Inc.*, 546 F.2d 1361 (10th Cir. 1976) (regulation of fictitious commodity options enterprise); *International Trading, Ltd.* v. *Bell*, 556 S.W.2d 420 (Ark. 1977), cert. denied, 436 U.S. 956 (1978) (deceptive sale of commodity options contracts); *Clayton Brokerage Co.* v. *Mouer*, 531 S.W.2d 805 (Tex. 1975) (sale of commodity options contracts); *Minnesota* v. *Coin Wholesalers, Inc.*, 250 N.W.2d 583 (Minn. 1976) (sale of silver coins on margin). No court has ever held that the CEA's exclusive jurisdiction provision deprives the FTC of authority to investigate the marketing practices of an entity that sells materials purporting to teach consumers how to get rich trading commodity futures.

3. Petitioners also incorrectly contend (Pet. 14-23) that this Court's review is warranted to determine whether the CEA or the IAA impliedly repeals the FTC's jurisdiction over petitioners' marketing activities. Like the question whether the CEA expressly deprives the FTC of jurisdiction, those questions are not squarely presented here. As petitioners themselves point out (Pet. 18), the court of appeals did not address whether the CEA impliedly repeals the FTC's jurisdiction, and this Court does not ordinarily address questions that were not passed on below. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999). As for whether the IAA impliedly repeals the FTC's jurisdiction, the court of appeals also did not conclusively resolve that question. Because this case is a subpoena enforcement proceeding, the court of

appeals held only that petitioners' arguments are not "sufficiently forceful to deprive the Commission of its general prerogative to determine, at least in the first instance, the scope of its own investigatory authority." Pet. App. 23a.

In any event, neither the CEA nor the IAA impliedly repeals the FTC's authority under the FTC Act to regulate petitioners' marketing practices. This Court has repeatedly made clear that "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective," *Radzanower* v. *Touche Ross & Co.*, 426 U.S. at 155 (quoting *Morton* v. *Mancari*, 417 U.S. at 551). Thus, although repeal by implication may occur when there is a "clear repugnancy" between two statutes, *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 190 (1978), the test employed in identifying such a conflict is extremely rigorous and has rarely been deemed satisfied. See, *e.g.*, *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597 (1976). Moreover, this Court has stressed that repeals by implication are not favored and will only be found where congressional intent to effect such a repeal is "clear and manifest." *Radzanower*, 426 U.S. at 154.

Petitioners fail to identify any irreconcilable conflict between the CEA and the FTC Act. See Pet. 14-19. The CEA prohibits any commodity trading advisor from "employ[ing] any device, scheme, or artifice to defraud any client or participant or prospective client or participant," 7 U.S.C. 6*o*(1)(A), or from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant," 7 U.S.C. 6*o*(1)(B). The FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(1). Petitioners claim (Pet. 15) that there is an

irreconcilable conflict because only the FTC Act prohibits "unfair" acts or practices. But there is no clear repugnancy because the CEA does not mandate that petitioners engage in any unfair act or practice that the FTC Act prohibits. Thus, as the court of appeals observed, petitioners "can—and of course should" refrain from practices prohibited by either statute. Pet. App. 22a.

Similarly, there is no clear repugnancy between the IAA and the FTC Act. The IAA contains prohibitions identical to those in the CEA and also prohibits "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. 80b-6(4). Just like the CEA, nothing in the IAA commands petitioners to engage in unfair practices prohibited by the FTC Act. Thus, the IAA's antifraud provisions are not in conflict with the FTC Act.[2]

Nor have petitioners shown any evidence that Congress intended the antifraud provisions of the CEA or the IAA to displace the FTC's authority to investigate marketing practices of the kind in which petitioners engage. As explained above, Congress intended the CEA to have only a limited exclusive effect. That effect is expressed in the CEA's exclusive jurisdiction provision, 7 U.S.C. 2(a)(1)(A), and is limited to regulations directly related to the actual sale of commodity

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[2] In that respect, this case differs from *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), on which petitioners rely (Pet. 16). In *Gordon*, this Court found that there was an irreconcilable conflict because the two statutory schemes at issue were likely to subject the stock exchange to conflicting standards, so that complying with one statute would put the stock exchange in violation of the other. See 422 U.S. at 689 (noting that "the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC").

futures on organized contract markets. Regarding the IAA, petitioners' only argument is that, because Congress included antifraud provisions in the IAA, Congress must have intended the IAA to displace the FTC's authority. See Pet. 19. But the inclusion of antifraud provisions in the IAA suggests no such thing. As this Court has recognized, more than one agency may simultaneously address the same issues and proceed against the same parties. See, *e.g.*, *United States* v. *Radio Corp. of America*, 358 U.S. 334, 343-344 (1959); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 631-632 (1953); *FTC* v. *Cement Institute*, 333 U.S. 683, 694 (1948).

Finally, there is no merit to petitioners' contention (Pet. 20-23) that the CEA and IAA displace the FTC Act because they are either more comprehensive or more specific. A later and more comprehensive statute will displace an earlier one only if it can "be said * * * that 'the later act covers the whole subject of the earlier one and is clearly intended as a substitute.'" *Radzanower*, 426 U.S. at 157 (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)). Neither the CEA nor the IAA covers the whole subject of the FTC Act because, as petitioners recognize (Pet. 15), neither prohibits the sorts of "unfair" practices specifically proscribed by the FTC Act.[3]

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[3] Thus, contrary to petitioners' contention (Pet. 16), *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88 (1870), does not provide them any assistance. In that case, this Court held that a later criminal statute that embraced all of the provisions of a former statute but imposed different and additional penalties operated as a repeal of the former statute. *Id.* at 92-93. As explained in the text above, neither the CEA nor the IAA embraces all conduct prohibited by the FTC Act.

As to petitioners' specificity argument, a more specific provision will displace a more general one only when there is a conflict between the two. See *Edmond* v. *United States*, 520 U.S. 651, 657 (1997). Even if the CEA and the IAA could be viewed as more specific than the FTC Act, there is no conflict between either the CEA or the IAA and the FTC Act because petitioners can simultaneously comply with each of these laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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